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No. 02-626

IN THE

Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS and
FRIENDS OF THE EVERGLADES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certiorari is warranted to review the Eleventh Circuit's ruling that pumping polluted waters without an NPDES permit, against their natural flow and from one distinct body of water to another, violates the Clean Water Act, where such ruling is consistent with decisions of every other circuit that has decided the issue.

2. Whether certiorari is warranted to review the Eleventh Circuit's ruling refusing to give *Chevron* deference to an opinion letter of counsel for a state agency, particularly where the opinion simply reflected such counsel's legal argument based on selected federal cases.

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BRIEF IN OPPOSITION

Respondents, Miccosukee Tribe of Indians and Friends of the Everglades, Inc., respectfully request that the Court deny the Petition for a Writ of Certiorari seeking review of the ruling of the United States Court of Appeals for the Eleventh Circuit in this case.

INTRODUCTION

Respondent Miccosukee Tribe of Indians (the "Tribe") is a federally-recognized Indian Tribe whose members live in the Florida Everglades. Respondent Friends of the Everglades, Inc. ("Friends") is a Florida non-profit corporation, whose members are committed to the protection of the Everglades. The Petitioner

South Florida Water Management District ("SFWMD") is a regional governmental entity which operates and manages a network of pumps, levees and canals in South Florida.

Through one of its facilities, the S-9 pump station, the SFWMD pumps polluted waters, against their natural flow, directly into Water Conservation Area 3A ("WCA-3A"), a vast portion of the Florida Everglades. The Tribe and Friends sued under the Clean Water Act, 33 U.S.C. § 1251, *et seq.* ("CWA") to enjoin the pumping into WCA-3A and to enforce the provision that requires the SFWMD to obtain a National Pollutant Discharge Elimination System ("NPDES") permit to continue pumping pursuant to 33 U.S.C. § 1342. The district court granted summary judgment for the Tribe and Friends. By stipulation the parties stayed the injunction requiring the SFWMD to stop operating the pumps. The Eleventh Circuit Court of Appeals affirmed the trial court, but ruled that prohibiting the use of the pumps would have been too drastic a remedy. It ordered the SFWMD to obtain the necessary NPDES permit within a reasonable period of time. To date, the SFWMD has not applied for such a permit.

The Petition should be denied because there is no conflict between the circuits. Every circuit that has decided this issue is either consistent with the Eleventh Circuit or considered factually distinguishable situations that have no applicability to the facts here.

Petitioner's argument that the Eleventh Circuit should have deferred to the legal opinion of counsel for Florida Department of Environmental Protection ("DEP") is not worthy of certiorari review because state agencies are generally not entitled to deference when interpreting federal law and more importantly, courts do not defer to the litigating position of state agency counsel. No federal agency has made an interpretation regarding the subject matter of this case.

Petitioner's argument that the public interest demands a less restrictive interpretation of the CWA than that applied by all circuits, including the Eleventh Circuit below, is not an issue worthy of certiorari review either. The public interest, as expressed by Congress in the CWA, requires the conclusion reached by the Eleventh Circuit here, and by every circuit that has decided the issue – that no pollutant be added from point sources into navigable waters without an NPDES permit.

COUNTER STATEMENT

A. Background

For generations, the Tribe and its members have lived and worked within the Florida Everglades. The Tribe has land interests lying within the Florida Everglades, including a perpetual lease from the State of Florida to most of WCA-3A. The Tribe's way of life, including their religious, cultural, economic, and historical identity, is dependent upon the natural Everglades ecosystem. This reliance by the Tribe and its members is conditioned upon preservation of the Everglades in its natural state, including but not limited to the quantity and quality of Everglades waters. Petitioner's Appendix ("Pet. App.") 16a.

Friends was founded by Marjory Stoneman Douglas, author of "The Everglades: River of Grass," for the purpose of protecting and restoring the Everglades. There are more than 4,000 members of Friends who use and enjoy the Everglades.

Petitioner, SFWMD, manages the Central & Southern Florida Flood Control Project through the operation of many levees, canals and water impoundment areas. The areas now called the C-11 Basin and WCA-3A were historically part of the Everglades ecosystem. In the early 1900's, the Army Corps of Engineers began digging the C-11 Canal to facilitate the draining of the western portion of Broward County, which is part of the C-11 Basin. Pet. App. 3a.

In the 1950's, the Corps constructed the L-37 and L-33 levees to permanently separate the C-11 Basin from the Everglades to the west, and thus created WCA-3A. If the levees had not been constructed, water would flow as a sheet across WCA-3A and the C-11 Basin in a southerly direction. Pet. App. 3a n.2. Because the levees generally also run North to South, they separated the C-11 Basin and WCA-3A along a natural dividing line. The C-11 Basin and WCA-3A are two separate bodies of water. It has been stipulated below that they each are "navigable waters" of the United States within the meaning of 33 U.S.C. § 1362, CWA. Pet. App. 21a.

The C-11 Canal runs through the C-11 Basin and collects water run-off from within the Basin and some natural seepage through the levees from WCA-3A. Pet. App. 3a. The S-9 pump station, which is the heart of this dispute, pumps this water through three pipes from the C-11 Canal through the L-37 and L-33 levees into WCA-3A to control flooding in Western Broward County. *Id.* The parties do not dispute that but for this pumping by the S-9 pump station, the polluted waters from the C-11 Canal would not flow into WCA-3A. Pet. App. 8a. While Petitioner suggests that some of the waters of C-11 and WCA-3A intermingle,[1] there is nothing in the record to suggest that without the S-9 pump, the polluted water would end up in WCA-3A.[2]

Neither is there any dispute that the waters in the C-11 Canal contain a higher level of pollutants than the natural waters in WCA-3A. Pet. App. 5a. Although the Petition devotes considerable ink and paper to a discussion of non-point source issues, perhaps in an effort to obfuscate the issues, the point-

1. Pet. 10. This suggestion is misleading because, at best, there is some evidence of natural seepage from WCA-3A *into* C-11, but no evidence of seepage in the other direction.

2. Each one of the three pumps can pump 960 cubic feet of water per second.

source status of the S-9 pump is undisputed. *Id.* at 4a–5a. The court below framed the narrow legal issue as "whether the pumping of the already polluted water constitutes an *addition* of pollutants to navigable waters *from* a point source." *Id.* It answered the question affirmatively under the facts of this case.

In order to convince the Court to review the Eleventh Circuit opinion, Petitioner argues that there is a conflict among the circuits regarding what constitutes an addition of pollutants requiring an NPDES permit under the CWA. No such conflict exists among the circuits. The decisions relied on by Petitioner are either consistent with the Eleventh Circuit's opinion or factually distinguishable because they involve "dam[s] and dam-induced water quality changes." The "dam" cases are inapplicable here. Pet. App. 5a n.4.

Petitioner acknowledges, Pet. 3, that *Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996) and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) are consistent with the decision here. The Eleventh Circuit stated that "[b]oth courts [the First and Second Circuits] emphasized that the two bodies of water were separate and that pollutants would not enter the second body except for the point source." Pet. App. 8a n.7. The conclusions reached by the First and Second Circuits were identical to the conclusions of the Eleventh Circuit in this case and consistent with the language of the CWA. The C-11 Basin and the WCA-3A are two separate bodies of water. The parties stipulated that each is a navigable water and neither disputed that the S-9 pump station, and pipes from which water is released, constitute a point source. Pet. App 4a-5a.

The cases cited by Petitioner as purported conflicts do not indicate any such conflict. The D.C., Fourth and Sixth Circuit cases involve factually distinguishable situations; they concern hydroelectric dams and not water quality changes induced by

facilities such as the S-9 pump station. Pet. App. 5a n.4. Nevertheless, even the tests announced in those cases would lead to the result here.

Petitioner's assertion that applying for an NPDES permit for the S-9 pump station would divert scarce resources from the eight billion dollar Comprehensive Everglades Restoration Project ("CERP"), Pet. 4, is disingenuous. CERP requires that water piped into the Everglades is clean so that the eight billion dollars are not wasted. The Water Resources Development Act of 1996, P.L. 104-303 ("WRDA 96") mandated that the restoration plan being developed must protect water quality and contain a related cost sharing mechanism. P.L. 104-303, §§ 528(b)(1)(A)(i), 528(e). The Water Resources Development Act of 2000, P.L. 106-541 ("WRDA 00") dictates that CERP include features to ensure that "all applicable water quality standards and applicable water quality permitting requirements" are met. P.L. 106-541, § 601(b)(2)(A)(ii)(II).

Petitioner also argues that the courts below should have deferred to the state agency's legal opinion letter. Certiorari is not proper because the Eleventh Circuit applied the correct legal principle: "[a] state agency's interpretation of federal law is generally not entitled to deference by the courts." Pet. App. 6a n.4. Moreover, as the Eleventh Circuit stated, there has been "no instance in which the EPA has extended its policy on dams and dam-induced water-quality changes to facilities like the S-9 pump station." *Id.* As the court further added, "[t]he EPA is no party to this case; we can ascertain no EPA position applicable to S-9 to which to give *any* deference, much less *Chevron* deference." The "interpretation" in this case consists primarily of the legal conclusions of the general counsel of a state agency on the meaning of selected federal cases. Pet. App. 45a–47a. Certainly, no deference is due to state agency counsel's interpretation of federal cases. The Petition should be denied because it provides no basis for certiorari review.

B. Decisions Below

The United States District Court for the Southern District of Florida, and again the Eleventh Circuit on appeal, ruled that the pumping of polluted waters from the S-9 pump station constitutes the addition of pollutants to WCA-3A. Both courts held that the Petitioner is required to obtain an NPDES permit if it wants to continue discharging pollutants into the Everglades. The Petitioner to date has not applied for the permit.[3]

C. Applicable Law

The CWA prohibits the discharge of pollutants from a point source into navigable waters without an NPDES permit. 33 U.S.C. §§ 1311(a), 1342. The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12); 40 C.F.R. § 122.2.

In order to enforce effluent limitations imposed to achieve the CWA's objectives, Congress established the NPDES program. *Environmental Protection Agency v. California*, 426 U.S. 200, 205 (1976); *United States v. Commonwealth of P.R.*, 721 F.2d 832 (1st Cir. 1983). The NPDES program has been called the most important component of the CWA. *Id.* at 834. Under the NPDES program, discharges of pollutants under 33 U.S.C. § 1311(a) are not necessarily prohibited, but they require an NPDES permit.

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3. Although the Petition intimates that applying for an NPDES permit, as directed by the Eleventh Circuit, would be akin to squaring a circle, reality is that NPDES permits can be applied for in due course. Compliance periods under NPDES permits are measured in years. The epic floods of which the Petition warns – both physical and of the lawsuit nature – can be avoided by doing as directed by the District Court and the Eleventh Circuit.

The lower courts in this case ruled that the discharges by the S-9 pump station into WCA-3A are of the type contemplated by the CWA, and that an NPDES permit is required for the continued operation of the S-9 pump station.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE ISSUES DECIDED BELOW.

The ruling below is in harmony with established precedent from other circuits, and the Petition fails to show a conflict among the circuits. The decisions on which Petitioner relies to assert conflict are either consistent with the Eleventh Circuit's decision in this case or factually distinguishable.

A. The Decisions Of The First Circuit In *Dubois* And The Second Circuit In *Catskill* Are Consistent With The Decision Below And There Is No Conflict In The Circuits.

Petitioner argues that the Eleventh Circuit's reliance on *Dubois* and *Catskill* conflicts with three other circuits. Petitioner has manufactured a conflict. The Eleventh Circuit's decision, and its reliance on *Dubois*, Pet. App. 28a, is consistent with every circuit that has decided the issue. The First, Second and Eleventh Circuit decisions all involved factual situations where pollutants entered one body of water from a separate body of water.

In *Dubois*, a ski resort corporation proposed to use waters from one body of water, the East Branch of the Pemigewasset River, to make artificial snow and to thereafter discharge left-over water into another body of water, Loon Pond. The Pemigewasset River water contained pollutants, which were thus conveyed through a system of pumps and pipelines into

clean Loon Pond. The trial court found that the CWA did not apply because the Pemigewasset River and Loon Pond were all part of a singular entity – the waters of the United States. The First Circuit in *Dubois* reversed, finding that there was no basis in law or fact for the district court's theory. *Id.* at 1296. It stated,

> [T]he transfer of water or its contents from the East Branch [of the Pemigewasset River] to Loon Pond would not occur naturally. This is more analogous to the example the district court gave from the opposite end of the spectrum: where water is added "from an external source" to the pond and an NPDES permit is required . . . [T]he East Branch is indeed a source "external" to Loon Pond. . . . The district court apparently would reach the same conclusion regardless of how polluted the Pemigewasset was or how pristine Loon Pond was. We do not believe Congress intended such an irrational result.

Dubois, 102 F.3d at 1297.

The Eleventh Circuit in this case recognized the logic in *Dubois*, and applied a "but for" test to determine whether the pollutant-laden waters from the C-11 canal would have reached WCA-3A but for the S-9 pump station. Significantly, *Dubois* demonstrates that it is irrelevant whether the pollutants are preexisting when they enter the pipe, pump or canal. What matters is the addition of pollutants to a clean body of water, not whether the pollutants are somehow added to the water by the pipe or pump.

Catskill is consistent with *Dubois* and the decision below in this case. *Catskill* involved a reservoir in New York's Catskill Mountains, which stored drinking water for New York City. Water containing minor pollutants was diverted from the reservoir through a tunnel for several miles and then released

into a pristine creek in order to facilitate the delivery of the water to New York City. The court stressed that under normal conditions, the water from the reservoir would never reach the creek. The Second Circuit reversed the trial court's holding and found that the reservoir and tunnel did effect an "addition" to the creek.

Catskill illuminates the correctness of the Eleventh Circuit's holding in the instant case. As in *Catskill*, this case deals with a transfer of water containing pollutants from one body of water (C-11 Canal) to another, distinct body of water (WCA-3A), mandating an NPDES permit.[4]

B. The Decisions Of The D.C. Circuit In *Gorsuch* And The Sixth Circuit In *Consumers Power* Do Not Conflict With The Opinion Of The Eleventh Circuit.

The Second Circuit in *Catskill* reviewed the cases Petitioner relies on to assert a conflict: *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) and found them to be consistent with its own decision. For an "addition" to exist under the CWA, *Gorsuch* and *Consumers Power* required that a "point source must introduce the pollutant into navigable water from the outside world." *Catskill*, 273 F.3d at 491. Provided the "outside world" stands for "any place outside the particular water body to which pollutants are introduced," explained the Second Circuit, its understanding of "addition" was in complete harmony with that of *Gorsuch* and *Consumers Power*. *Id.* "Given that

4. The Petitioner fails to distinguish the instant case from *Catskill*. *See* Pet. 17 n.4. The undisputed fact is that WCA-3A and the C-11 Basin are separate bodies of water – one relatively clean and the other relatively polluted. Petitioner gives no reason why the fact that both waters were connected half a century ago should permit the discharge of pollutants, against the natural flow, from one into the other today.

understanding of 'addition', the transfer of water containing pollutants from one body of water to another, distinct body of water, is plainly an addition and thus a 'discharge' that demands an NPDES permit." *Id.*

Moreover, *Catskill* casts doubt on Petitioner's contention that "[t]he Circuits are sharply divided" in their definitions of "from" and "addition." Pet. 14. *Catskill* discusses the cases cited by the Petitioner for the conflict argument and explains how those cases are in harmony. Neither *Catskill*, nor the Eleventh Circuit below, hold as Petitioner states that "any changes in the natural flow of water that causes polluted water to pass from one water body to another" requires an NPDES permit Pet. 14–15. These circuits apply the precise words of the CWA concerning *point sources* that direct polluted water from one body of water to a distinct and different body of water where pollutants would not have ended up "but for" the change in natural flow. The cases are consistent in interpreting the clear language of the CWA.

The hydroelectric dam cases, *Gorsuch* and *Consumers Power*, fit within the parameters set out by *Dubois* and *Catskill* and confirm – not discredit – the court's ruling below. They are not apposite here because "Congress [has] clearly displayed an intention to exempt dams from the Clean Water Act." *Consumers Power*, 862 F.2d at 586. In *Gorsuch*, the National Wildlife Federation sued the Environmental Protection Agency ("EPA") over the EPA's failure to require operators of hydroelectric dams to obtain an NPDES permit. The National Wildlife Federation claimed that river water captured by a dam becomes "polluted", and that the subsequent discharge of the waters downstream is the addition of pollutants from a point source, requiring NPDES regulation.

The EPA argued that an "addition" from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world. *Gorsuch*, 693 F.2d at 175. In the case of the typical storage dam that holds

water in a reservoir, the EPA argued, there can be no "addition", because the source is not the outside world. *Consumers Power*, 862 F.2d at 584. The D.C. Circuit in *Gorsuch* found that the EPA's interpretation of the CWA was not manifestly unreasonable, and ruled that the discharge from a dam to the river below was not a point-source discharge requiring an NPDES permit. 693 F.2d at 175. As the Eleventh Circuit stated, there is no dispute in this case that the discharge here was from a point source.

Unlike *Dubois*, *Catskill*, and this case, *Gorsuch* "essentially involved the recirculation of water, without anything being added 'from the outside world.'" *Catskill*, 273 F.3d at 491. Nothing was introduced to the river that was not already there. *Id. Gorsuch* did not involve two separate and distinct bodies of water, where pollutants from one are introduced to the other. The water in *Gorsuch* was part of the same rivers at all times. The EPA's ruling that the discharge of the dammed-up water was not tantamount to an "addition" of pollutants was consistent with the test employed by the Eleventh Circuit in this case.

> The *Gorsuch* and *Consumers Power* decisions comport with the plain meaning of "addition," assuming that the water from which the discharges came is the same as that to which they go. If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot (beyond, perhaps, a *de minimis* quantity of airborne dust that fell into the ladle). In requiring a permit for such a "discharge," the EPA might as easily require a permit for Niagara Falls.

Catskill, 273 F.3d at 492.

The D.C. Circuit in *Gorsuch* concluded that "dam-caused pollution is unique," and emphasized the narrowness of its

decision. *Id.* at 182-83. The S-9 pump station in the instant case is clearly not a dam because dams typically control the flow of water within a single body of water. *See Del-Aware Unlimited, Inc. v. Pennsylvania*, 508 A.2d 348, 381-82 (Pa. 1986) (*Gorsuch* is "distinguishable because it dealt with a single body of water"). *Consumers Power* defines a dam as "any structure that impounds water." *Id.* at 590. No one can argue that the S-9 pump station at issue here is a dam. The "dam" cases are factually distinguishable and Petitioner improperly uses these cases to attempt to create a conflict.

Yet, even considering the unique nature of cases involving dams, the decision in *Gorsuch* is in complete harmony with that of the Eleventh Circuit in this case. In *Gorsuch*, no "addition" occurred because the polluted dam-waters stayed within the same body of water – the rivers where they would have ended up without the dam. In the present case, an "addition" did occur because the polluted canal waters were pumped into a separate body of water, WCA-3A, where they would not have ended up but for the discharge.

Consumers Power involved a power plant on the shores of Lake Michigan. The power company had "withdrawn water from [the lake], along with some surprised fish, for hydro-electric power generation. The water and fish were then returned to the Lake after passing through hydroelectric generators, which pureed some of the fish." *Catskill*, 273 F.3d at 491. The Sixth Circuit in *Consumers Power* found that returning the fish to the Lake, albeit in a different form, was not an "addition" because the fish already existed there. 862 F.2d at 585; *see also Catskill*, 273 F.3d at 491. The Sixth Circuit held that it could not distinguish the dam[5] used to store the Lake Michigan waters from the dams in *Gorsuch*. 862 F.2d at 585.

5. The District Court in *Consumers Power* implicitly acknowledged that the storage reservoir used by the facility was a "dam." *National Wildlife Fed'n v. Consumers Power Co.*, 657 F. Supp. 989, 1008 (W.D.Mich 1987); *Consumers Power*, 862 F.2d at 589.

As in *Gorsuch* (but unlike *Dubois*, *Catskill* and the instant case) the water in *Consumers Power* was recirculated and returned to the same body of navigable water from whence it came. The Sixth Circuit therefore concluded that the releases from the hydropower plant were not introduced from the outside world and that no NPDES permit was required. *Id.* at 586; *Catskill*, 273 F.3d at 492.

The Eleventh Circuit clearly recognized the distinction between the case at hand and the dam cases. In *Gorsuch*, the District of Columbia Court of Appeals gave deference to EPA's position that a dam did not add pollutants from the outside world and, thus, no NPDES permit was required for a dam to release the water into a downstream river. *Id.* at 174-75. Pet. App. 5a n.4.

Petitioner cannot use the dam cases to invoke certiorari jurisdiction based on inter-circuit conflict. No "addition" occurred in these cases because the alleged pollutants stayed in the same body of water where they would have ended up even without the pumping. In the instant case, an "addition" did occur because the polluted canal waters were pumped into a separate body of water, WCA-3A, where they would not have ended up but for the discharge. Pet. App. 7a. Thus, the dam cases are factually distinguishable and do not support certiorari based on conflict.

The Petitioner also relies on the Fourth Circuit case of *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976), a case that focused on regulations establishing limitations on the discharge of heat from steam electric generating plants into navigable waters, a factual scenario similar to the dam cases. The Fourth Circuit discussed various cooling methods for power plants, all of which involved the taking of water from a lake or pond for cooling and subsequent return of the water to the same cooling lake or pond. *Id.* at 1357-58. The Fourth Circuit found

that the Federal Water Pollution Control Act did not require that power plants remove pre-existing pollutants before they return them to the navigable water where they originally came from.

While *Appalachian Power* discusses addition of pollutants under the CWA only as a side-issue in its comparison of various cooling methods for steam electric plants, the case nevertheless demonstrates the consistency with which the circuits have dealt with the addition requirement over the years. It demonstrates the correctness and internal consistency of *Dubois*, *Catskill*, *Gorsuch*, *Consumers Power*, and the decision here. What Petitioner calls the "Traditional Addition Test" is nothing but an early expression of the test employed by the Eleventh Circuit in this case. In its brief discussion of what constitutes an addition of pollutants under the Act, the Fourth Circuit confirmed that the Act is concerned with discharges of pollutants into navigable waters that did not already contain these pollutants. The discharge of polluted water from the C-11 Basin into WCA-3A constitutes an 'addition" under the Fourth Circuit Test in *Appalachian Power*.

The district court and the circuit court in this case, the First Circuit in *Dubois*, and the Second Circuit in *Catskill* did not, as Petitioner suggests, misinterpret the addition requirement of the CWA, ignore congressional intent, eviscerate jurisdictional requirements, or otherwise fail to understand the law. They followed established precedent, including *Gorsuch* and *Consumers Power*. The SFWMD would be required to obtain an NPDES permit in the Fourth, Sixth and D.C. Circuits because the SFWMD's discharges add pollutants to a separate body of water.

No conflict has been shown in the Circuits. The Petition should be denied.

II. THE STATUTORY INTERPRETATIONS URGED BY THE PETITIONER ARE INCORRECT AND HAVE BEEN PROPERLY DISMISSED BY THE LOWER COURTS.

The Petitioner's entire discussion of legal precedent and the court's ruling below contains an incorrect interpretation of the CWA. The Petitioner argues that the discharge at issue in this case does not require an NPDES permit because the S-9 pump station "adds nothing to the water it pumps." Pet. 1. Petitioner contends that it "adds" nothing to the water because it only pumps water containing pollutants from other sources in Broward County.

The Petition states that: "[t]he fundamental issue in this case is whether a state water management agency may pump water, to which it adds nothing, from one side of a levee to the other without the need for a federal National Pollutant Discharge Elimination System . . . permit. . . ." Pet. 1–2. As the Eleventh Circuit explained, the addition requirement of the CWA focuses on the receiving body of water, and not on the water as it is being pumped. Pet. App. 6a. This interpretation of the CWA is not, as Petitioner argues, expansive. It is logical, in harmony with decisions in other circuits, and is consistent with the CWA.

The Petitioner's arguments lead to illogical results under the CWA. Petitioner reaches conclusions only by distorting the language of the *Gorsuch* and *Consumers Power* cases in order to manufacture an alleged conflict. Moreover, the issues as framed by the Petitioner mischaracterize the factual premise of this dispute by ignoring that this case deals with two separate bodies of water.

The Eleventh Circuit affirmed the trial court's holding that "for an addition of pollutants to be *from* a point source, the relevant inquiry is whether – but for the point source – the

pollutants would have been added to the receiving body of water." Pet. App. 7a (emphasis added). The Eleventh Circuit expressly rejected the Petitioner's interpretation that in order to be "from" a point source, the point source itself (the pump in this case), must have added the pollutants to the water. The Eleventh's Circuit's conclusions are consistent with the requirements of the CWA as is the Second Circuit's opinion in *Catskill*:

> a pipe, ditch, channel, tunnel, or conduit is unlikely to have created the pollutants that it releases, but rather transports them from their original source to the destination water body. . . . The tunnel itself need not have created the pollution; it is enough that it conveys the pollutants from their original source to the navigable water.

273 F.3d at 493.

To use the Second Circuit's words, the view advanced by the Petitioner "misunderstands the import of the term 'point source,' which does not necessarily refer to the place where the pollutant was created but rather refers only to the proximate source from which the pollutant is directly introduced into the destination water body." *Id.* at 493. Under Petitioner's view of the CWA, scores of cases where the point source itself did not add any pollutants to the water it conveyed are suddenly erroneous. In the Petitoner's world, a perfectly engineered pipe draining pollutants from a landfill while adding nothing to the water it conveys, can pollute a pristine body of water with impunity.

The Second Circuit has debunked that argument in *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1990), where run-off from a landfill flowed through a railroad culvert into a wetland area. The City of Burlington, Vermont, had denied that

the culvert was a point source for the addition of pollutants because the pollutants had entered the waters of the United States before they flowed through the culvert. The Second Circuit rejected the view that an addition only occurs when pollutants are introduced into navigable waters for the first time. Instead the court focused on whether the railroad culvert ultimately conveyed the pollutants into the wetlands. *Id.* at 1355; *see also United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985) (waste materials that collected in a ditch and from there entered navigable waters constitute an addition from a point source); *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945 (W.D. Tenn. 1976) (rejecting view that pollutants must be discharged directly into navigable waters). *Dague* also demonstrates that traditional local water management is not exempt from the mandates of the CWA as the Petition suggests.

The Fourth Circuit in *United States v. Law*, 979 F.2d 977 (4th Cir. 1992) stressed that the origin of pollutants in CWA cases is irrelevant. The proper focus is upon the discharge from the ponds into the receiving body of water. *Id.* at 979. Likewise, the Eleventh Circuit correctly rejected the Petitioner's argument that it is not subject to the NPDES requirement in the CWA because it did not "add" anything to the waters it pumped.[6] The court agreed that the receiving body of water, WCA-3A, rather than the water being pumped, is the relevant water under the CWA. Pet. App. 6a. The CWA focuses on "additions" to "navigable waters," not to the fungible liquid as the Petitioner suggests.

The Petitioner's warning that the Eleventh Circuit's ruling is so expansive "that it is difficult to imagine any significant state or municipal water management system that would not require federal permitting" rings hollow. Pet. 4. According to

6. Petitioner relies on Webster's Dictionary – Unabridged, rather than 30 years of jurisprudence, to define "addition."

the Petitioner's reading of the CWA, the Court should have interpreted the CWA so restrictively that it is difficult to imagine any significant pipe or pump discharging pollutants that would require federal permitting. The "hundreds of thousands" of water control structures "operating illegally" under the Eleventh Circuit decision do not exist in the record below or in reality. Pet. 24.

The Petition fails to show any conflicts in the courts and should be rejected on that basis. The Eleventh Circuit found that the fact that "the pollutants are not formed solely by S-9 is immaterial in a plain reading of the act." This interpretation is consistent with the CWA and the applicable case law from all circuits. *See* Pet. App. 29a.

III. THE ELEVENTH CIRCUIT WAS CORRECT IN NOT DEFERRING TO STATE AGENCY COUNSEL'S LEGAL OPINION LETTER IN THIS CASE BECAUSE COUNSEL'S LEGAL ARGUMENT CONCERNING FEDERAL LAW IS NOT ENTITLED TO DEFERENCE.

In misplaced reliance on *Gorsuch* and *Consumers Power*, the Petitioner argues it should have prevailed because the Eleventh Circuit should have given *Chevron* deference[7] to what Petitioner asserts was EPA's position that no NPDES permit is required for the operation of the S-9 pump. However, EPA has never taken a position in this case.[8]

7. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) ("[I]f Congress has explicitly left a gap for the agency to fill, there is an expressed delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

8. The EPA has not intervened, has not filed *amicus curiae* briefs, and has not provided affidavit testimony or other support for the position asserted by Petitioner.

The Petition concedes that there is no express agency position by the EPA with respect to the S-9 pump station, or any similar facilities for that matter, but laconically states that "formal written agency action . . . would not be expected." Pet. 26. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988), requires that no deference be given to agency counsel's litigating position.

Petitioner's argument concerning the EPA's position relies on two questionable bases: old and inapplicable EPA statements unique to dam-cases, and an opinion letter by the General Counsel for Florida's DEP, based on that counsel's interpretation of selected federal cases, that no NPDES permit was required in this case. Pet. 12.

A. EPA's Position Formulated In The Dam Cases Is Not Entitled To Deference Because It Does Not Apply In This Context.

The Eleventh Circuit in the instant case declined to let the alleged EPA position affect its ruling because Petitioner could not point to any instances where the EPA had extended its policy on dams and dam-induced water-quality changes to facilities like the S-9 pump station. Pet. App. 5a–6a n.4. "The EPA is no party to this case; we can ascertain no EPA position applicable to S-9 to which to give *any* deference, much less *Chevron* deference." *Id.*

The Eleventh Circuit correctly declined to give any deference to the EPA's agency position taken in briefs filed decades ago in the *Gorsuch* and *Consumers Power* dam cases. To understand the irrelevance of the EPA's agency position in *Gorsuch* in the context of this case, it helps to consider the genesis of deference to the EPA's position in CWA discharge cases. The concept was first applied in *Gorsuch*, where the EPA was the primary defendant. *Gorsuch* discussed

the issue of pollutant discharges from hydroelectric dams generically, rather than any specific dam. The EPA had studied how discharges from dams in general should be treated and took an official agency position, contemporaneously with the passage of the Clean Water Act. 693 F.2d at 167. *Gorsuch* stressed that contemporaneous construction and subsequent consistency increase the amount of deference to be given to an agency's interpretation. *Id.* at 167 n.31. This assures the integrity of the process: agency positions taken *ad hoc* to attain a desired result in a given case are not entitled to deference, while positions that are taken generically, contemporaneously with the passage of the interpreted law, and subsequent consistent positions, deserve the deference afforded by the D.C. Circuit in *Gorsuch*. Yet, the D.C. Circuit in *Gorsuch* gave deference only after ensuring that the EPA's position was not manifestly unreasonable. More importantly, it emphasized the narrowness of its decision.

Because *Consumers Power* was also a dam case, and the EPA remained consistent with its earlier position concerning dams, the Sixth Circuit also gave deference to the EPA's position in the *Consumers Power* case (the EPA had filed an *amicus curiae* brief). However, in *Appalachian Power*, upon which the Petition relies heavily, the Fourth Circuit rejected the EPA's position on various issues.

Later still, in *Catskill*, the Second Circuit questioned how much deference should have been afforded to the EPA's position in the *Gorsuch* and *Consumers Power* cases, given the fact that the EPA's original position had not been adopted in a rulemaking or other formal proceeding. The issue proved to be irrelevant in *Catskill* for two reasons. First, *Catskill* was not a dam case. The EPA's addition test for the CWA was formulated expressly for dam cases and not for "separate bodies of water" cases. Secondly, the *Catskill* court found

that the EPA's addition test would have led to the correct result. An addition of pollutants from the outside world did take place in *Catskill* and an NPDES permit was required.

Similarly, it would not have mattered if the court in this case had applied the EPA's addition test set forth in *Gorsuch*. The outcome would have been the same. Pollutants from the outside world are being added by the S-9 pump station to WCA-3A, and an NPDES permit is required.

B. No Deference Is Warranted To The Opinion Letter Of The General Counsel Of The Florida Department Of Environmental Protection.

Petitioner's second argument asks for certiorari review based on alleged lack of deference to a state agency position. The court below stated the correct legal principle that a state agency's interpretation of federal law is generally not entitled to deference. Pet. App. 6a n.4. *See GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999). Moreover, petitioner misrepresents what it claims is entitled to deference. The deference argument is based upon an opinion letter by the General Counsel for Florida's Department of Environmental Protection. Pet. App. 43a–48a. The letter was, according to its own words, written in response to a November 25, 1998 request of the Petitioner, who by then had been embroiled in this litigation for more than 10 months. It is an agency position taken *ad hoc* to attain a desired result.

DEP General Counsel's opinion is not the opinion of the EPA. Yet, the Petition imputes DEP Counsel's opinion to the EPA. *See, e.g.*, Pet. 13. Thus, the opinion letter of an attorney for a state agency, interpreting selected federal laws has morphed in the Petition into the official position of an agency of the United States of America and, according to Petitioner, should have been decisive in this case.

Although Florida's DEP was authorized by the Florida Legislature to establish a state NPDES program in accordance with the CWA, DEP never was given the authority to formulate official agency positions for the EPA.[9] Moreover, the suggestion that general counsel of the DEP should be the proverbial tail to wag the dog, deciding in place of the EPA and numerous federal circuits what the CWA means, is not consistent with any decision of this Court or any circuit. Nothing in the concept of cooperative federalism requires delegation of the ultimate power to interpret federal law to the general counsel of Florida's Department of Environmental Protection. A self-serving opinion letter created during the course of litigation does not satisfy any requirement of deference. The six-page cursory discussion of selected cases is entitled to no deference whatsoever because it is simply legal argument. Pet. App. 6a n.4.

The Petition's reliance on the DEP Opinion Letter ignores cases suggesting that agency positions in opinion letters do not deserve any sort of deference. *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference"). Even if a state agency's interpretation of federal law were entitled to any deference by the courts, the DEP opinion letter in this case was not persuasive and was properly rejected by the Eleventh Circuit. Its interpretation of federal law was based entirely upon the dam cases.

Petitioner readily admits that the weight that should be accorded to the DEP counsel's opinion letter must depend

9. The Petitioner also appears to be uncertain about the distribution of authority in the actual restoration process of the Everglades. It incorrectly states at Pet. 11 that § 528(b) of WRDA 96, directs the South Florida Ecosystem Restoration Task Force to develop a comprehensive plan to restore, preserve and protect the Everglades and its water quality. That duty is reserved to the Secretary of the Army. *Id.*

(a) upon the thoroughness evident in its consideration, (b) the validity of its reasoning, (c) its consistency with earlier and later pronouncements, and (d) all those factors that give it power to persuade, if lacking power to control. Pet. 24–25, relying on *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). That analysis is very instructive in this case. The Petitioner cannot even meet its own test:

(a) The opinion letter is anything but thorough, neglecting to even consider *Dubois* and *Catskill*, which Petitioner now admits are relevant to the issue.

(b) The validity of its reasoning is suspect, having relied solely on dam cases which are "unique" and involve structures that are "exempt from the Clean Water Act". *Gorsuch*, 693 F.2d at 182; *Consumers Power*, 862 F.2d at 586.

(c) The opinion letter at issue was written at the request of the SFWMD after litigation commenced. If earlier pronouncements had existed, the SFWMD would not have had to enlist the help of the DEP's general counsel. Accordingly there are no consistent earlier or later pronouncements.

(d) Given the fact that DEP ostensibly lacks the power to control the issue, only factors that give the DEP's counsel power to persuade are relevant. One such factor, as the *Gorsuch* court pointed out, is whether the agency position was formulated contemporaneously with the law being interpreted. That is not the case here. The alleged agency interpretation by the DEP was formulated decades after the law it interprets and, more importantly, approximately one year after inception of this case.

Another important factor is whether the agency position has been adopted in a rulemaking or other formal proceeding. *Catskill*, 273 F.3d at 490; *see also Christensen*, 529 U.S. at 587. Again, the opinion letter fails.

Petitioner's argument urging deference to a non-existing position of a federal agency (EPA) and an irrelevant position of a state agency (DEP) is not a proper basis for this Court to grant certiorari review.

IV. THE PETITION SHOULD BE DENIED, NOT HELD FOR *BORDEN RANCH PARTNERSHIP v. U.S. ARMY CORPS OF ENGINEERS.*

The Court has accepted certiorari review in *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), *cert. granted*, 122 S. Ct. 2355 (U.S. June 10, 2002) (No. 01-1243). *Borden Ranch* involves the excavation and redepositing of materials in a wetland area, and requires consideration of Section 404 dredge and fill permit issues, 33 U.S.C. §§ 1344(a), (d), which are administered by the United States Army Corps of Engineers. *Id.* at 814.

Unlike *Borden Ranch*, the instant case involves permits for point source discharges pursuant to Section 402 of the CWA, which are administered by the EPA. While some definitions under the CWA may pertain to both Section 404 dredge and fill cases and to Section 402 point source discharge cases, the two sections concern very different factual situations and the application of the definitions varies a great deal between the two.

The primary issue in *Borden Ranch* is whether naturally occurring substances become pollutants once they are dredged and redeposited in the same location. The primary issue in this

case is whether an NPDES permit is required when adding pollutants from a point source to another body of water where the pollutants would not have otherwise ended up.

While there may be variation among the courts concerning the administration of Section 404 dredge and fill permits, the decisions on Section 402 point source discharge cases are in harmony. The ultimate decision by this Court in *Borden Ranch* will not disturb that harmony. Therefore, the Court should deny certiorari, and should not hold the Petition.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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